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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 EXCEPTIONAL INNOVATION, LLC,
11
12 Plaintiff,
13 vs.
14 KONTRON AMERICA, INC.,
15 Defendant.

CASE NO. 07CV2041 LAB(LSP)

**KONTRON AMERICA, INC.'S RESPONSE
TO COURT'S ORDER TO SHOW CAUSE**

Honorable Larry Alan Burns
Ctm: 9
Action Filed: June 27, 2007

16 KONTRON AMERICA, INC.,
17 Counter-Claimant,
18 v.
19 EXCEPTIONAL INNOVATION, LLC,
20 Counter-Defendant.

21 **KONTRON IS A CALIFORNIA AND DELAWARE RESIDENT; EXCEPTIONAL AND ITS**
22 **MEMBERS RESIDE IN OHIO OR FLORIDA**

23 Defendant and Counter-Claimant Kontron America, Inc. ("Kontron") is a Delaware
24 corporation, with its principal place of business in San Diego County, California. Counter-
25 claim (docket no. 7), ¶ 3. Kontron has alleged that Plaintiff and Cross-Defendant Exceptional
26 Innovation, LLC ("Exceptional") is an Ohio Limited Liability Company, with its principal
27 place of business in Delaware County, Ohio. Counter-claim (docket no. 7), ¶ 3. Kontron is
28 informed and believes, and, if the Court so requires, Kontron will allege in a first amended

1 counter-claim that Exceptional has two individual members, neither of whom reside in
2 California or the State of Delaware. See the accompanying Declaration of Anthony T.
3 Hallett ("Hallett Decl."), ¶ 11. More specifically, Exceptional's only two members are Eric
4 Eichensehr (who resides in Ohio) and Seale Moorer (who resides in either Ohio or Florida).
5 See Hallett Decl., ¶ 4-9.

6 The amount in controversy exceeds \$75,000, exclusive of interests and costs.
7 Counter-claim (docket no. 7), ¶ 4.

8 Accordingly, with Kontron a citizen of the States of California and Delaware and
9 Exceptional and its individual LLC members citizens of the States of Ohio or Florida, there is
10 complete diversity of citizenship among the parties. With the amount in controversy and
11 diversity requirements fully satisfied, there exists federal diversity jurisdiction over this
12 matter.

13 **THE TRANSFEROR COURT ALREADY FOUND FEDERAL DIVERSITY JURISDICTION IN**
14 **THIS CASE**

15 Exceptional originally filed its complaint against Kontron for declaratory relief in Ohio
16 state court. Kontron timely removed to the United States District Court for the Southern
17 District of Ohio (the "Ohio District Court") based on federal diversity jurisdiction. Kontron
18 filed a motion to transfer venue from the Ohio District Court to this Court based on
19 contractual forum selection clause and applicable law. Having found federal diversity
20 jurisdiction in the first instance, the Ohio District Court granted Kontron's motion and
21 transferred venue to this District. See the Ohio District Court's Opinion and Order entered
22 on October 11, 2007 (docket no. 1, entry 16). The finding of federal diversity jurisdiction is
23 now the law of this case. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800,
24 816-7 (1988) ("As most commonly defined, the doctrine [of the law of the case] posits that
25 when a court decides upon a rule of law, that decision should continue to govern the same
26 issues in subsequent stages in the same case.")

27 "[T]he doctrine applies as much to the decisions of a coordinate court in the same
28 case as to a court's own decisions." *Id.* at 817 (citations omitted). "Indeed, the policies

1 supporting the doctrine apply with even greater force to transfer decisions than to decisions
2 of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a
3 coordinate court threaten to send litigants into a vicious circle of litigation." *Ibid.* (citations
4 omitted). "There is no reason to apply law-of-the-case principles less rigorously to transfer
5 decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—
6 jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice." *Id.* at
7 817 n.5 (citation omitted).

8 CONCLUSION

9 With both a previous court order exercising jurisdiction over this matter, and
10 additional evidence before this Court that there is complete diversity between Kontron as a
11 California and Delaware resident and Exceptional and its members as residents of Ohio or
12 Florida, this Court has subject matter jurisdiction. Kontron respectfully requests that the
13 Court vacate its Order to Show Cause regarding jurisdiction and allow this case to proceed
14 in this Court. In the alternative, Kontron requests leave to file a first amended counter-claim
15 that will allege Ohio or Florida as the residency of Exceptional's members.¹

16 DATED: November 20, 2007

SOLOMON WARD SEIDENWURM & SMITH, LLP

17
18 By: /s/ Elizabeth A. Mitchell
NORMAN L. SMITH
19 ELIZABETH A. MITCHELL
20 Attorneys for Defendant and Counter-Claimant
KONTRON AMERICA, INC.
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27 ¹ If the Court finds Kontron's showing insufficient in any way, Kontron alternatively requests leave to
28 conduct jurisdictional discovery and time to submit additional evidence regarding Exceptional's residency.

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Solomon Ward Seidenwurm & Smith, LLP, 401 B Street, Suite 1200, San Diego, California 92101.

On November 20, 2007, I served a copy, including all exhibits, if any, of the following document(s):

KONTRON AMERICA, INC.'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE

DECLARATION OF ANTHONY T. HALLETT IN SUPPORT OF KONTRON AMERICA, INC.'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE RE JURISDICTION

on the parties in this action listed in the attached Proof of Service List, which is incorporated herein by this reference, by the following means:

☒ **(BY MAIL)** I caused each such envelope to be sealed and placed for collection and mailing from my business address. I am readily familiar with the practice of Solomon Ward Seidenwurm & Smith, LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business mail is deposited with the postage thereon fully prepaid in the United States Postal Service the same day as it is placed for collection. I am aware that upon motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

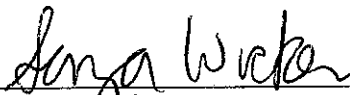
☐ **(BY PERSONAL SERVICE)** I caused each such envelope to be sealed and given to a courier authorized by our attorney service to receive documents for delivery on the same date. A proof of service signed by the authorized courier will be filed forthwith.

☐ **(BY FEDERAL EXPRESS)** I am readily familiar with the practice of Solomon Ward Seidenwurm & Smith, LLP for the collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.

☒ **(BY FACSIMILE)** This document was transmitted by facsimile transmission from (619) 231-4755 and the transmission was reported as complete and without error. I then caused the transmitting facsimile machine to properly issue a transmission report, a copy of which is attached to this affidavit.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of this bar of this court, at whose direction this service was made.

Executed on November 20, 2007, at San Diego, California.


Sonja Wicker

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